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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

STATE OF MISSOURI, *et al.*,
Petitioners,
v.
KALIMA JENKINS, *et al.*,
Respondents.

On Writ of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS

The Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") was established in 1963 at the request of President Kennedy to involve private lawyers in a national effort to assure civil rights to all Americans. The Lawyers' Committee

has enlisted the services of thousands of members of the private bar in cases involving discrimination in voting, education, employment, housing, and municipal services.

The Lawyers' Committee has a long history of participation in school desegregation cases before this Court,[1] and in the lower courts, including cases obtaining relief for educational inequalities. Amicus submits that its experience in school desegregation litigation enables it to provide a perspective different from the parties and other amici on the issues before this Court.[2]

STATEMENT OF THE CASE

The State of Missouri has raised a variety of issues in its petition for certiorari and in its opening brief. Indeed, it is unclear from the various papers filed by the State precisely what questions it seeks to raise. Nevertheless, amicus suggests that this case should be decided according to the standards for unitary status discussed in *Freeman v. Pitts*, 112 S. Ct. 1430 (1992), in the context of educational remedies designed to create a unitary school system and to make whole the victims of segregation.

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[1] *See, e.g.*, amicus briefs in *Freeman v. Pitts*, 112 S. Ct. 1430 (1992); *Board of Educ. v. Dowell*, 498 U.S. 237 (1991); *Missouri v. Jenkins*, 495 U.S. 33 (1989); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986); *Grove City College v. Bell*, 465 U.S. 555 (1984); *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983); *Crawford v. Board of Educ.*, 458 U.S. 527 (1982); *Board of Educ. v. Harris*, 444 U.S. 130 (1979); *Bradley v. School Board*, 416 U.S. 696 (1974); *Alexander v. Holmes County Board of Educ.*, 396 U.S. 19 (1969); *NAACP v. Button*, 371 U.S. 415 (1963).

[2] Petitioners and respondents have consented to the filing of this brief, and their letters of consent are being filed separately with this brief.

This case highlights the importance of the process for determining partial unitary status.[3] The State in this case did not file a motion for partial unitary status. Instead, the State raised the issue in an opposition brief to the school district's motion to continue funding of the educational improvement programs at an unchanged level for the 1992–93 school year.

During the evidentiary hearing on the motion for continued funding, the parties were permitted to present live witnesses and other evidence. The State presented testimony from only one witness, Dr. Terry Stewart of the Missouri Department of Elementary and Secondary Education. Dr. Stewart offered only limited testimony on some of the four *Freeman* unitary status requirements. *See* J.A. 439-483 (State's entire affirmative case on the *Freeman* requirements).[4] Dr. Stewart asserted that both defendants had complied with the court orders concerning each educational program, that the level of educational resources provided by some of the programs was higher in the Kansas City District than in surrounding school districts, and that quality of educational opportunities had "improved" in the Kansas City District. *Id.* Dr. Stewart had nothing to say about whether the programmatic remedies had eliminated to the extent practicable the vestiges of segregation in the areas of educational quality. J.A. 483. The State also offered no evidence of its good faith commitment to the goals of the remedial decree. *Id.*; P.A. 19.

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[3] The procedural posture of the case is more fully detailed in the Brief of Respondents Kansas City, Missouri School District and American Federation of Teachers Local 691.

[4] The Petition for Certiorari is cited in this brief as Pet. Cert., the Appendix to the Petition for Certiorari as P.A., the Reply in support of the Petition as Pet. Reply Br., the Joint Appendix as J.A., and Petitioner's Brief on the merits as Pet. Br.

Plaintiffs and the District presented witnesses and evidence refuting the State's claims. Those witnesses testified that racial isolation was decreasing, that additional progress in remedying the vestiges of segregation was necessary and practicable, and that the educational programs were integrally related to each other and to the overall remedy. J.A. 417, 422, 423-425.

The district court concluded that the State had failed to meet its burden under *Freeman* to demonstrate that partial unitary status of the educational programs component of the remedy had been achieved. J.A. 482; P.A. 70-72. On appeal, the Eighth Circuit reviewed the application of the factors discussed in *Freeman*, and affirmed the conclusion that the State had not met its burden of establishing partial unitary status. P.A. 19. Specifically, the Eighth Circuit ruled that the "evidence on the record fell far short of establishing that such vestiges had been eliminated to the extent practicable," and that the State failed even to address whether judicial control over the educational improvement programs was necessary or practicable to achieve compliance with the other remedial components, and whether the State had demonstrated a good faith commitment to the whole of the court's decree. *Id.*

The State does not challenge the manner in which the district court or court of appeals balanced the limited evidence offered. Instead, the State attempts to characterize the decision below as standing for a legal proposition which, as the State concedes, was not adopted by the district court and, according to the State, "first surfaced" in the Eighth Circuit's panel opinion: that unitary status was denied because student test scores had not achieved some unspecified level. Pet. Br. at 48 n.32.

In response to the State's petition for rehearing *en banc*, the Eighth Circuit explicitly stated that it was *not* adopting a standard

for unitary status that requires a specified level of student achievement or specific scores on standardized tests. In denying rehearing *en banc*, the author of the panel opinion, Judge John R. Gibson, wrote:

> [t]est scores ... must be *only one factor* in the equation. Nothing in this Court's opinion, the district court's opinion, or the testimony of KCMSD's witnesses indicates that test results were the only criteria used in denying the State's claim that its obligation for the quality education programs should be ended by a declaration that they are unitary.

Denial of Rehearing *En Banc* (P.A. 48-49) (emphasis added). Likewise, neither the District nor the *Jenkins* plaintiffs have ever advocated an exclusive or specific test scores standard.

SUMMARY OF ARGUMENT

Since *Brown v. Board of Education*, this Court has consistently held that school authorities found to have intentionally segregated students have an obligation to eliminate all vestiges of segregation. This obligation requires more than the disestablishment of *de jure* segregation; it also requires the elimination of all aspects of inequality of educational opportunity and educational harm suffered by African American and other minority students. The State challenges the lower courts' consideration of educational quality, failing to appreciate that educational harm to minority students is a key vestige of prior segregation that must be remedied.

The State's arguments would also do violence to the established standards and process for making a unitary status determination. This Court's desegregation cases establish clear standards, guided by traditional principles of equitable discretion,

for determining whether the purposes of a desegregation decree have been accomplished. Most recently, this Court in *Freeman* and *Dowell* articulated a process for district courts to follow when deciding whether a desegregation decree should be partially or completely dissolved. In this case, the State failed to satisfy the standards or follow the process this Court has established for the determination of partial unitary status.

The Court should reject the State's argument that evidence of educational outcomes is irrelevant to a unitary status determination. A district court must undertake a searching inquiry into all facets of a school district's operations before deciding to partially or completely dissolve a desegregation decree. District courts should not be precluded from considering evidence that is clearly relevant, and that can be central to determining whether the remedy has been completely effective in eliminating the vestiges of segregation.

ARGUMENT

I. THIS COURT HAS CONSISTENTLY HELD THAT ALL VESTIGES OF SEGREGATION, INCLUDING EDUCATIONAL HARM AND INEQUALITY, MUST BE ELIMINATED FROM FORMER *DE JURE* SEGREGATED SCHOOL SYSTEMS.

This Court consistently and forcefully has held that the obligation of school authorities in formerly *de jure* segregated systems is to remove all vestiges of segregation to the extent practicable. *Freeman v. Pitts*, 112 S. Ct. 1430, 1443 (1992); *Board of Educ. of Oklahoma City v. Dowell*, 498 U.S. 237, 250 (1991); *Swann v. Charlotte-Mecklenburg Board of Educ.*, 402 U.S. 1, 15 (1971); *Green v. County School Board*, 391 U.S. 430, 437-38 (1968). Indeed, the depth of this obligation has been

described as an affirmative duty to eliminate segregation and its effects "root and branch." *Freeman*, 112 S. Ct. at 1443 (*quoting Green*, 391 U.S. at 437-38).

The constitutional command to disestablish dual school sytems and its effects, therefore, has always required not only the desegregation of all aspects of a school system, but elimination of the essential conditions associated with segregated and unequal schooling — the inequality of educational opportunities and the educational harm suffered by African American and other minority children. *Brown v. Board of Education*, 347 U.S. 483, 493-94 (1954) (*Brown I*); *Green*, 391 U.S. at 437-38; *Milliken v. Bradley*, 433 U.S. 257, 289-90 (1976) (*Milliken II*); *Freeman*, 112 S. Ct. at 1443.

Even prior to *Brown I*, this Court recognized and required relief to address not only the obvious, but the intangible inequalities and harms occasioned by segregated and discriminatory schooling in higher education, both through separate segregated schools, *Sweatt v. Painter*, 339 U.S. 629, 635-36 (1950), and through racial isolation and disparate conditions and opportunities within a purportedly desegregated school, *McLaurin v. Oklahoma State Regents*, 339 U.S. 637, 640-41 (1950).

In *Brown I*, the Court decided that, in the context of "separate but equal" schooling, minority children in segregated public schools were deprived of "equal educational opportunities." 347 U.S. at 493. The Court held that intentional segregation causes a variety of harms, including stigmatic injury and lowered educational achievement, which must be addressed by desegregation remedies. The Court found that the stigma imposed on minority students by state-imposed segregation "generates a feeling of inferiority as to their status in the

community that may affect their hearts and minds in a way unlikely ever to be undone," and reasoned that "this feeling of inferiority" had "'a tendency to [retard] the educational and mental development of Negro children.'" *Id.* at 493-94 (*quoting McLaurin*, 339 U.S. at 641).

Accordingly, in *Green*, this Court required a searching inquiry as to all facets of a school system in fashioning and assessing remedies, to ensure the elimination of segregation and inequalities in facilities, resources, faculties, and other factors affecting the opportunity of minority children to learn and participate in the school programs. These inquiries apply not only to the features of the original dual system, but to other ways in which segregation and inequality may have been perpetuated in schools and school systems. *See United States v. Fordice,* 112 S.Ct. 2727, 2735 (1992); *Columbus Board of Education v. Penick*, 443 U.S. 449, 458-59 (1979); *Dayton Board of Education v. Brinkman* (*Dayton II*), 443 U.S. 526, 538-39 (1979).

These fundamental remedial objectives were explicitly reaffirmed in this Court's recent school desegregation rulings. The duty and responsibility of a

> school district once segregated by law is to take all steps necessary to eliminate the vestiges of the unconstitutional *de jure* system. This is required in order to insure that the principal wrong of the *de jure* system, the injuries and stigma inflicted upon the race disfavored by the violation, is no longer present.

Freeman, 112 S. Ct. at 1443.

In *Freeman*, this Court expressly approved inquiries by the courts "to determine whether minority students were being disadvantaged in ways that required the formulation of new and

further remedies to insure full compliance with the court's decree," 112 S. Ct. at 1446. The Court also endorsed efforts by which "a district court can concentrate both its own resources and those of the school district on the areas where the effects of *de jure* discrimination have not been eliminated and further action is necessary in order to provide real and tangible relief to minority students," even while withdrawing supervision in other areas. 112 S. Ct. at 1447.

The focus of these efforts is to bring about the establishment of school systems in which the characteristics of segregation and unequal opportunity are removed and the effects of those conditions eliminated, *Green*, 391 U.S. at 437-38, "so that parents, students and the public have assurance against further injuries or stigma...." *Freeman*, 112 S. Ct. at 1449; *see also United States v. Fordice*, 112 S. Ct. 2727, 2743 (1992) (O'Connor, J., concurring) (emphasizing "the lost educational and career opportunities and stigmatic harms caused by discriminatory educational systems").[5]

At the same time, consistent with longstanding equitable principles, this Court has required that students affected by segregated and unequal schooling must be restored to the position they would have attained in the absence of the constitutional violation. *Milliken II*, 433 U.S. at 282, 290. Thus,

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[5] In suggesting that the courts should be concerned only with the generation of students who attended schools operating in their original condition of *de jure* segregation, the State misunderstands the remedial focus, which must concern whether the school system — as an institution that profoundly affects the development and life opportunities of children — has transformed itself. *See* Pet. Br. at 41. Moreover, the State is simply incorrect in contending that in this case, "any direct constitutional violation ended sometime between 18 and 40 years ago." Pet. Br. at 37. This contention ignores the findings in this case that the State had failed to undertake any steps to dismantle the dual system as of 1984 and 1985. J.A. 14, 46-50.

during the process by which a school district is transformed to eliminate its dual nature and all effects of *de jure* segregation, relief to restore students' lost educational opportunities and to address students' educational injuries is appropriate and necessary. *Id.* at 290.

The State's arguments would require the courts to treat as irrelevant evidence as to whether minority students continue to suffer educational harm. Such arguments simply ignore the fundamental holding of *Brown I* and "the principal wrong" addressed in this Court's subsequent desegregation jurisprudence. *Freeman*, 112 S. Ct. at 1443.

II. THE STANDARDS, PROCESS, AND SCOPE OF INQUIRY ESTABLISHED BY THIS COURT ARE ESSENTIAL TO THE CONSIDERATION OF WHETHER A SCHOOL DISTRICT HAS ATTAINED UNITARY STATUS.

A. This Court Has Established Clear Standards For the Consideration and Determination of Partial Unitary Status That Are Appropriately Directed at Determining Whether the Objectives of *Brown* Have Been Satisfied.

The Court's desegregation case law has always held that the ultimate goal of a remedial decree is to disestablish the dual school system and its vestiges, to cure the harmful effects of segregation and make the victims whole, and to prevent the re-emergence of a segregated school system. *See, e.g. Green*, 391 U.S. at 437-38 & n.4 (school district must "take whatever steps might be necessary to convert to a unitary school system in which racial discrimination would be eliminated root and branch" and which will "bar like discrimination in the future"); *Milliken II*, 433 U.S.

at 282 (approving make-whole educational relief designed to "restore the victims of discriminatory conduct to the position they would have enjoyed in terms of education"); *Dowell*, 498 U.S. at 247 (a remedial decree would not be terminated until the purposes of the decree "had been fully achieved").

Consistent with these principles, the Court has in a long line of cases identified factors important in determining whether the goals of the remedial decree are being fully achieved. In *Brown v. Board of Education*, 349 U.S. 294, 300 (1955) (*Brown II*), the Court emphasized that school authorities must demonstrate "full" compliance with a remedial order. The Court also has consistently held that compliance with the decree must be actually effective in eliminating the vestiges of past discrimination. *See, e.g., Green*, 391 U.S. at 437-38; *Dowell*, 498 U.S. at 250. Similarly, the Court has noted that the interdependence of the remedies ordered must be considered. *See, e.g., Rogers v. Paul*, 382 U.S. 198, 200 (1965) (holding that students can challenge discriminatory faculty assignments because such assignments can "render[] inadequate an otherwise constitutional pupil desegregation plan").[6]

In addition, demonstration of a good faith commitment to desegregation has long been an important requirement of school authorities under a duty to dismantle a dual school system, as this helps ensure that discrimination will not re-emerge. *See, e.g., Brown II*, 349 U.S. at 300 ("good faith compliance" with the court's decree required); *Green*, 391 U.S. at 438 n.4 (decree

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[6] As noted in *Freeman*, the Court has "long recognized that the *Green* factors may be related or interdependent. Two or more *Green* factors may be intertwined or synergistic in their relation, so that a constitutional violation in one area cannot be eliminated unless the judicial remedy addresses other matters as well." 112 S. Ct. at 1449.

should effectively "bar like discrimination in the future"); *cf. Penick*, 443 U.S. at 661 (liability finding predicated in part on lack of good faith affirmative commitment to dismantling dual system).[7]

In *Freeman*, the Court synthesized this long line of cases, articulating the standards for determining when a district court could completely or partially terminate a remedial decree. The Court held that, in order to be declared to have achieved partial or complete unitary status, the defendants had to demonstrate that: (i) "there has been full and satisfactory compliance with the decree;" (ii) "the vestiges of past discrimination had been eliminated to the extent practicable;" (iii) "retention of judicial control is [not] necessary or practicable to achieve compliance with the decree in other facets of the school system;" and (iv) "the school district has demonstrated, to the public and to the parents and students of the once disfavored race, its good faith commitment to the whole of the court's decree and to those provisions of the law and the constitution that were the predicate for judicial intervention in the first instance." *Freeman*, 112 S. Ct. at 1446.

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[7] *Freeman* quoted with approval from the First Circuit's decision in *Morgan v. Nucci*, 831 F.2d 313 (1st Cir. 1987), which emphasized the importance of a showing of good faith: "[a] finding of good faith ... reduces the possibility that a school system's compliance with court orders is but a temporary constitutional ritual." *Id.* at 321. In a subsequent decision in *Morgan*, the First Circuit stressed that the evaluation of the effectiveness of a remedy must take into account whether it will maintain a desegregated system in the future: "[i]f there were not some discretion lodged in a desegregation court to attempt in a modest and limited way to assure that the attainment of long sought for goals was not illusory and ephemeral, the entire exercise, into which so many had invested so much, could well prove to have been a painful charade." *Morgan v. Burke*, 926 F.2d 86, 91 (1st Cir. 1991), *cert. denied*, 112 S. Ct. 1664 (1992).

In this case, the State offered only limited and conclusory evidence, on at most two of the four *Freeman* requirements: whether the State had complied with the decree and whether the remedies in the case were intertwined. *See* J.A. 439-483. The Eighth Circuit correctly found that by failing to present evidence to allow the detailed inquiry contemplated by *Freeman*, the State had failed to carry its burden of establishing that the court should discontinue the educational programs. P.A. 19-20.

B. This Court Has Established a Process That Is Essential To Determining Whether the Standards for Partial Unitary Status Have Been Satisfied.

This Court's decisions regarding the determination of partial or complete unitary status have emphasized the process that must be followed by the parties and the lower courts. The Court's most recent desegregation decisions, in *Dowell*, *Freeman*, and *Fordice*, have turned on issues of process. Those decisions have addressed at least four aspects of the required process that are relevant here.

First, it is well established that a remedial order may not be terminated absent an unambiguous notice to the parties that termination of the remedial order is contemplated. In *Dowell*, the Court held that notwithstanding a finding by the district court that the school district was unitary, the remedial order had not been terminated because of ambiguity as to whether the district court had found that the vestiges of past discrimination had been eliminated. 498 U.S. at 249-50 & n. 2.[8]

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[8] Underscoring the importance of process to this determination, the Court quoted a lower court's statement that "unitary status" means that the school district "has eliminated the vestiges of its prior discrimination *and has been adjudicated as such through the proper judicial procedures*." 498 U.S. at 245

Second, the process must include an evidentiary hearing in the district court. In *Freeman*, the Court emphasized that the "[p]roper resolution of any desegregation case turns on a careful assessment of its facts." 112 S. Ct. at 1437. In *Fordice*, the Court found error in the district court's failure to "make clear whether it had directed the parties to develop evidence...." 112 S. Ct. at 2741.

Third, the party seeking to terminate the remedial order must bear the burden of proof with regard to each of the standards. The Court's opinion in *Freeman* reiterated that, like all defendants seeking termination of an equitable remedy, those found guilty of *de jure* segregation bear the burden of demonstrating that the objectives of the remedy have been achieved, and "that any current imbalance is not traceable, in a proximate way, to the prior violation." *Id.* at 1447; *see also Fordice*, 112 S. Ct. at 2741 (*Brown* and its progeny "established that the burden of proof falls on the *State*, and not the aggrieved plaintiffs, to establish that it has dismantled its prior *de jure* segregated system").[9]

Fourth, the district court must state its conclusions and make specific findings of facts. In *Dowell*, the Court held that "[i]f [a

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(quoting *Georgia State Conference of Branches of NAACP v. Georgia*, 775 F.2d 1403, 1413 n. 12 (11th Cir. 1985)) (emphasis added).

[9] This burden is not unique to desegregation cases. It is the product of the longstanding equitable principle that before an injunction is to be dissolved, the party who has been adjudged a violator must satisfy the court that the purposes of the injunction have been fully served. *See United States v. Swift & Co.*, 286 U.S. 106, 119 (1932); *Ruiz v. Lynaugh*, 811 F.2d 856, 861 (5th Cir. 1987); *New York State Ass'n for Retarded Children, Inc. v. Carey*, 706 F.2d 956, 969-70 (2d Cir.), *cert. denied*, 464 U.S. 915 (1983); *Humble Oil & Refining Co. v. American Oil Co.*, 405 F.2d 803, 813 (8th Cir.) (Blackmun, J.), *cert. denied*, 395 U.S. 905 (1969).

desegregation] decree is to be terminated or dissolved, [plaintiffs] as well as the school board are entitled" to a precise statement of the basis for the decision. 498 U.S. at 246. *Freeman*, likewise, explicitly required "specific findings and conclusions" from the district court on the standards for unitary status. 112 S. Ct. at 1430. The Court's opinion in *Fordice* found, among the errors in the process below, that the district court had failed to "make clear ... what th[e] evidence revealed." 112 S. Ct. at 2741.

For this Court to take up the State's attack on the educational remedy in this case at this procedural stage would do violence to the process in each of these respects. First, the State challenges a ruling of the district court not on a motion for unitary status, but on approval of a funding level for certain educational programs. *See* P.A. 10, 69-74. The State's contentions in the district court regarding these educational programs appear even more ambiguous with respect to the standards for unitary status[10] than was the order in *Dowell* that this Court rejected on process grounds.

Second, there was no full evidentiary hearing addressing each of the standards for unitary status, but only a single witness who gave testimony (discounted by the district court as conclusory) regarding the District's educational programs. *See* J.A. 439-483; P.A. 18.

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[10] In a subsequent order dated July 30, 1993, in which the State again sought partial unitary status for the educational programs, the district court made clear that it found the State's contentions regarding the quality of the District's educational programs fatally inconsistent — veering from the position that the programs were hopelessly ineffective to the position that the programs went further than the violation required. P.A. 112-13.

Third, the State made no factual showing that could have carried its burden of proof on the standards for unitary status. *Id.*; P.A. 19.

Fourth, the district court's findings and conclusions addressed the issue that was before it — approval of a plan, and funding, for educational programs — not the standards for determining whether the District had achieved partial unitary status. P.A. 10, 19, 69-74.

In these four respects, the State failed to comply with the process through which the issue of partial unitary status must be presented to the district court. As a result, there is no occasion for this Court even to order a remand on that issue. The state must comply with its evidentiary burdens so that, as discussed below, the district court in the first instance can conduct a broad inquiry of all the facts and circumstances in order to render an informed decision.

C. In Applying the Standards for Partial Unitary Status, the District Court's Inquiry is Broad, in Accord With Traditional Principles Governing the Exercise of Equitable Discretion.

The Court has consistently recognized that district court judges must consider a broad range of factors when exercising equitable discretion to formulate and supervise a court-ordered remedy. The Court in *Brown II* acknowledged that "because of their proximity to local conditions and the possible need for further hearings, the courts which originally heard these cases can best perform this judicial appraisal." *Brown II*, 349 U.S. at 299. The district court, in fact, must play the primary role in the process — a role that the appellate courts cannot properly

supplant.[11] Thus, in *Green*, the Court directed the district courts to weigh proposed remedies "in light of the facts at hand and in light of any alternatives which may be shown as feasible and more promising in their effectiveness." *Id.* at 439. "Once invoked, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility is inherent in equitable remedies." *Milliken II*, 433 U.S. at 281 (*quoting Swann*, 402 U.S. at 15).

With respect to a unitary status determination, a district court's exercise of equitable discretion must likewise be informed by an examination of "every facet of school operations" when "considering whether the vestiges of *de jure* segregation ha[ve] been eliminated." *Dowell*, 498 U.S. at 250 (*quoting Green*, 391 U.S. at 435). *Freeman* reaffirmed that "both when a remedy is ordered and in the later phases of desegregation when the question is whether the courts' remedial control ought to be modified, lessened, or withdrawn," the court must examine the school system "in all its facets." *Freeman*, 112 S. Ct. at 1443-44. Most recently, in *United States v. Fordice*, 112 S. Ct. 2727 (1992), the Court observed that "we have consistently ... examined a wide range of factors to determine whether the State has perpetuated its formerly *de jure* segregation in any facet of its institutional system." *Id.* at 2735.

Thus, in contending that a district court is precluded from considering anything beyond the "*Green* factors," Pet. Br. at 20, 28-29, the State fundamentally misunderstands the nature of the district court's equitable discretion in making a unitary status determination. There is no simple formula for determining

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[11] *See Dowell*, 498 U.S. at 249-51 (remanding for district court determinations); *Freeman*, 112 S. Ct. at 1450 (same); *Fordice*, 112 S. Ct. at 2743 (same).

whether the vestiges of segregation have been eliminated. "[T]he *Green* factors need not be a rigid framework." 112 S. Ct. at 1146-47. The *Freeman* court specifically affirmed the district court's consideration of factors in addition to those set out in *Green*: "It was an appropriate exercise of its discretion for the District Court to address the elements of a unitary system discussed in *Green*, to inquire whether other elements ought to be identified, and to determine whether minority students were being disadvantaged in ways that required the formulation of new and further remedies...." *Id.* at 1446.[12]

The State's focus on only one factor — that did not even figure in the district court's decision and purportedly "first surfaced" as a part of the court of appeal's decision — is fundamentally at odds with the process described above. The State's position would constrict the evidence that the lower courts could consider, which would be a remarkable change in this Court's long line of desegregation case law. Moreover, by asking this Court to act upon a legal standard never adopted or even considered by the district court, the State would have this Court supplant the primary role of the district courts in this area.

III. EVIDENCE OF EDUCATIONAL OUTCOMES CAN BE RELEVANT AND HIGHLY SIGNIFICANT IN DETERMINING WHETHER UNITARY STATUS HAS BEEN ACHIEVED.

The State's petition and brief raise the question whether the lower courts erred in considering evidence of educational outcomes as part of the inquiry into unitary status. Such evidence

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[12] Justice Souter's concurrence similarly emphasized that "*Green's* list of specific factors, of course, need not be treated as exclusive," 112 S. Ct. at 1454 n.1 (Souter, J., concurring).

can be quite important for a district court in its evaluation of a school district "in all of its facets." *Freeman*, 112 S. Ct. at 1443.

A. This Court Has Consistently Held That a Searching Inquiry of Facts Regarding All Facets of a School System Is Required To Determine Appropriate Remedies and Their Effectiveness.

From the outset of its desegregation cases, this Court has required district courts to consider *all* available evidence of minority students' educational opportunities in deciding whether they are being deprived of equal protection under the laws. The Court in *Brown I* observed that it had rejected the imposition of any limitation on the facts that could be considered in deciding whether educational harm had resulted from segregation:

> In *Sweatt v. Painter* [339 U.S. 629 (1950)], in finding that a segregated law school for Negroes could not provide them equal educational opportunities, this Court relied in large part on 'those qualities which are incapable of objective measurement but which make for greatness in a law school.' In *McLaurin v. Oklahoma State Regents* [339 U.S. 637 (1950)], the Court, in requiring that a Negro admitted to a white graduate school be treated like all other students, again resorted to intangible considerations: '... his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession.'

347 U.S. at 493. By considering all of these factors, the Court indicated that *all* evidence of the quality of education should be considered in deciding whether the students' constitutional right to equal protection of the laws was being violated.

This Court's more recent cases addressing unitary status determinations have similarly stressed the need to consider a broad range of evidence which bears on a school district's progress in eliminating the vestiges of segregation. *See Freeman*, 112 S. Ct. at 1437 ("[p]roper resolution of any desegregation case turns on a careful assessment of its facts"); *id.* at 1443-44 (district court should examine the school district "in all of its facets"); *Dowell*, 498 U.S. at at 250 (court should examine "every facet of school operations" when "considering whether the vestiges of *de jure* segregation ha[ve] been eliminated" (quoting *Green v. County School Board*, 391 U.S. 430, 435 (1968)).

B. District Courts Should Not Be Required To Ignore Relevant Evidence of the Effectiveness of a School District's Efforts to Desegregate.

Were this Court to adopt the position that district courts may not rely on evidence of educational "outcomes" in the course of determining whether unitary status had been achieved, district judges, faced with a difficult and fact-specific unitary status inquiry, would be deprived of highly relevant evidence. As this Court has stated, "the measure of a desegregation plan is its effectiveness." *Davis v. School Comm'rs*, 402 U.S. 33, 37 (1971). Evidence which bears on the effectiveness of the school district's desegregation efforts can be some of the most significant evidence available to a district court exercising its equitable discretion. A district court should not be precluded from considering such evidence in making a unitary status determination.[13]

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[13] In its reply in support of the petition for certiorari, the State proposed a *per-se* rule that evidence of educational outcomes is necessarily irrelevant to a unitary status determination. *See* Pet. Cert. Reply at 3 ("the lower courts were simply wrong in ***permitting consideration***" of educational outcome measures as relevant evidence) (emphasis added); *see also* Pet. Cert. Reply Br. at 6 n.5 ("[b]ecause the Fourteenth Amendment requires only the provision of equal opportunities, ***any*** reliance on test scores is improper") (emphasis in original). In its brief on the merits, the State may have intended to retreat from this extreme argument, but it persists in its challenge to the lower courts' use of educational achievement evidence. *See, e.g.*, Pet. Br. at 45-49.

There are numerous contexts in which "outcome" measures may be relevant to a unitary status determination. The lower courts, following this Court's mandate to examine "every facet of school operations," *Dowell*, 498 U.S. at 250, have considered evidence of the "outcomes" of many different aspects of a district's experience under an order to desegregate, including the following:

- *Academic achievement*: Courts have analyzed evidence of academic achievement of minority and majority students in a desegregating district. *See, e.g., United States v. City of Yonkers*, 833 F. Supp. 214 (S.D.N.Y.1993); *Pennsylvania Human Relations Comm'n v. School Dist.*, 638 A.2d 304, 321-23 (Pa. Commonw. 1994).

- *Discipline*: Courts have considered evidence that minority students in a district under a court-ordered duty to desegregate were subjected to disciplinary measures more frequently than their white peers. *See, e.g., Lee v. Etowah Co. Bd. of Educ.*, 963 F.2d 1416, 1426 (11th Cir. 1992) (relying on "evidence that black students within the system were more likely to be suspended from school than were white students within the system"); *Quarles v. Oxford Mun. Separate School Dist.*, 868 F.2d 750, 755-56 (5th Cir. 1989) (district court finding that "race plays no part in administering discipline in the Oxford School System" was not clearly erroneous).

- *Retentions and Drop-outs*: Courts have addressed evidence that minority students in a desegregating district dropped out of school at greater rates than white students. *See, e.g., United States v. City of Yonkers*, 833 F. Supp. 214, 223 (S.D.N.Y. 1993) (evaluating evidence of "disproportionate ... retentions and drop-outs").

Such evidence can shed light on each of the "factors which must inform the sound discretion of the court" in making a unitary status determination. *Freeman*, 112 S. Ct. at 1446. Evidence of the actual effects of a school district's efforts to desegregate clearly bears on whether the district has "complied in good faith with the desegregation decree since it was entered," *Dowell*, 498 U.S. at 249; whether the "vestiges of past discrimination have been eliminated to the extent practicable;" and "whether minority students [are] being disadvantaged in ways that require[] the formulation of new and further remedies." *Freeman*, 112 S. Ct. at 1446. Indeed, such evidence can help the court determine whether a district has grudgingly "dragged its feet" in response to court orders, or has instead demonstrated the required "good faith commitment to the whole of the court's decree and to those provisions of the law and the constitution that were the predicate for judicial intervention in the first instance." *Freeman*, 112 S. Ct. at 1446.

Evidence which bears on the effectiveness of the remedy can be particularly important in assessing whether a district has complied in good faith with quality-of-education components of a court order under *Milliken II*. Such "educational components" of a remedy are designed to "restore the victims of discriminatory conduct to the position they would have enjoyed in terms of education," and can include "programs to remedy deficiencies, particularly in reading and communication skills" caused by

unconstitutional conditions. 433 U.S. at 281-82. The Court in *Milliken II* recognized that the purpose of programmatic relief such as was ordered in this case is to increase the achievement levels of minority students. The Court quoted the appeals court finding that "'[w]ithout the reading and counseling components, black students might be deprived of the motivation and *achievement levels* which the desegregation remedy is designed to accomplish.'" *Id.* at 278 (emphasis added) (quoting *Bradley v. Milliken*, 540 F.2d 229, 241 (6th Cir. 1976)). A district court evaluating whether a *Milliken II* remedy has accomplished its remedial purpose must therefore consider evidence indicating whether the programs have actually "remed[ied] deficiencies" suffered by victims of segregation. *Id.*

The State erroneously maintains that "the many external factors that affect achievement" somehow render outcome evidence irrelevant to a unitary status inquiry. Pet. Br. at 41. Contrary to the State's implication, this Court in *Freeman* reaffirmed the traditional role of district courts in considering, evaluating and weighing evidence, and the ability of district judges to evaluate evidence of test scores and other measures of educational achievement in an appropriate context. 112 S. Ct. at 1446–47.[14] Indeed, the district court in this case demonstrated a careful analysis of achievement test score data in a subsequent order, dated April 16, 1993. While finding that the data were generally relevant and reliable, the court downplayed the KCMSD's use of data on student achievement because it was not

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[14] *See United States v. City of Yonkers*, 833 F. Supp. 214, 221 (S.D.N.Y. 1993) (finding that vestiges of past segregation remained based in part on consideration of achievement measures); *Pennsylvania Human Relations Comm'n v. School Dist.*, 638 A.2d 304, 321-23 (Pa. Commonw. 1994) (denying motion for unitary status after examining "extensive testimony" including evidence of "achievement levels of students").

"probative to the extent which the District used it to make its sweeping conclusions as to academic success." P.A. 131. Thus, the district court's use of test score data cannot fairly be criticized as arbitrary or improper.

C. This Court Has Rejected Similar Attacks on the Consideration of Clearly Relevant Evidence.

Perhaps recognizing that it is not tenable to challenge the rulings below for merely considering data regarding educational achievement, the State asserts that the lower courts used standardized test scores as the *sole basis* for maintaining the remedial order in effect. But the courts below imposed no explicit or implicit "standardized test score" requirement for unitary status. In fact, the courts below treated evidence of student achievement as one of many factors relevant to determining whether the defendants had eliminated the vestiges of past segregation to the extent practicable.

The State's attack on a purported "test scores" requirement is simply a new version of a long-rejected argument. In earlier cases, defendants asserted that courts' reliance on student ethnicity data or faculty hiring goals was constitutionally impermissible. For example, in *Swann*, upon which the State relies, the defendant "urged that the District Court ha[d] imposed a racial balance requirement" on every school. 402 U.S. at 23. The Court read the district court's reliance on pupil assignment ratios not as inflexible "mathematical ratios" but as "a starting point in the process" of forming and evaluating a remedy. *Id.* at 25. The Court approved the use of such reference points because the "remedial decree is to be judged by its effectiveness," and reference to the racial composition of the school system provided a useful starting point "in shaping a remedy to correct past constitutional violations." *Id.* The Court thus affirmed the

district court's order as "within the equitable remedial discretion" of the district court. *Id.; see also Freeman,* 112 S. Ct. at 1437 ("a critical beginning point is the degree of racial imbalance" and "[t]his inquiry is fundamental").

The lower courts also have rejected arguments akin to the State's argument that — simply because numerical goals have been considered by the district court — an inflexible test has been imposed which must be met to achieve unitary status. *See e.g. Morgan v. Burke*, 926 F.2d at 90-91 (in denying partial unitary status with respect to faculty hiring, the court rejected the argument that hiring goals amounted to impermissible fixed ratio).

Similarly, in this case, the courts below did not create an inflexible mathematical standard, but rather considered student achievement data as one piece of relevant evidence. This was not error. As in *Swann*, this Court should distinguish between consideration of relevant and objective evidence, and imposition of an arbitrary quota. The courts below imposed no test score "quota" and their decisions should be affirmed.

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

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Respectfully submitted,

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